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Nos. 81-1077 and 81-1088

In The

Supreme Court of the United States

October Term, 1981

FRANK MARSH, State Treasurer; ROBERT E. PALMER, Chaplain and Officer of the Nebraska Unicameral; FRANK LEWIS, JOHN DeCAMP, ROBERT L. CLARK, TOM FITZGERALD, STEVE FOWLER, HOWARD A. LAMB, RICHARD D. MARVEL, LORAN SCHMIT, and JEROME WARNER, in their official capacity as members of the Executive Board of the Legislative Council of the Nebraska Unicameral,

Petitioners,

vs.

ERNEST CHAMBERS,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Tenth Amendment precludes maintenance of this action to abolish the Nebraska State Legislature's traditional practice of beginning each day's sitting with an invocation from its chaplain provided for by the Legislature's rules of proceedings.

2. Whether other fundamental principles of federalism require the federal courts to refrain from exercising jurisdiction over this action.

3. Whether petitioners, consisting of the individual members of the Legislature's Executive Board, the Chaplain, and the State Treasurer, are entitled to absolute legislative immunity from respondent's suit.

4. Whether the Nebraska Legislature's compensation and retention of a single individual as Chaplain for an extended period of time renders its legislative prayer practice violative of the Establishment Clause of the First Amendment to the United States Constitution.

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OPINIONS DELIVERED BY THE COURTS BELOW

1. United States District Court for the District of Nebraska (Warren K. Urbom, C. J.).

   a. Memorandum and Order filed November 24, 1980, overruling petitioners' motion to dismiss on grounds of legislative immunity. *See,* Exhibit A.

   b. Judgment and Memorandum of Decision filed on December 24, 1980, reported at 504 F. Supp. 585 (1980) (Exhibits B and C). The district

court found the practice of the legislative invocation by a Chaplain constitutional and dismissed the legislator petitioners from the action. However, the court further found the expenditure of public funds to compensate the Chaplain and to print legislative prayer books unconstitutional for violation of the Establishment Clause and enjoined the Treasurer from making such expenditures and the Chaplain from accepting his compensation.

2. United States Court of Appeals for the Eighth Circuit.

   a. Opinion of a three-judge panel, filed on April 14, 1982, affirming in part and reversing in part the judgment of the district court and remanding the case to the district court for further action consistent therewith, reported at 675 F. 2d 228 (1982) (Exhibit D). The Court of Appeals determined that the several elements of the Nebraska legislative prayer practice should not be viewed separately, but as a whole, and ruled that the prayer practice violated the Establishment Clause because of the retention of a single clergyman, paid for his services, as the exclusive source of the morning invocations over an extended period of time, and because it involved the publishing of prayer books.

   b. Order of May 12, 1982, staying the mandate of the court for 60 days from that date. (Exhibit E).

GROUNDS FOR JURISDICTION

The judgment of the United States District Court for the District of Nebraska was entered on December 24, 1980, following a trial to the court on December 1, 1980 (Exhibits B and C). Thereafter, petitioners Palmer and Marsh timely appealed to the Court of Appeals for the Eighth

Circuit those portions of the district court judgment determining that jurisdiction was proper and finding the expenditure of public funds to pay the Legislative Chaplain violative of the Establishment Clause. Respondent timely appealed the balance of the district court judgment finding the underlying prayer practice constitutional.

Oral arguments were heard by the Court of Appeals on October 13, 1981. Its opinion affirming in part and reversing in part the district court's judgment was entered on April 14, 1982 (Exhibit D). Petitioners immediately moved for a stay of the mandate pending the filing and disposition of their petition for writ of certiorari. By order dated May 12, 1982, the Court of Appeals stayed the mandate for 60 days from that date, to be extended until final disposition of the case by this court upon the filing of a certificate of the clerk of this court stating that the petition for writ of certiorari has been filed (Exhibit E).

The jurisdiction of this court is invoked under 28 U. S. C. § 1254 (1), which authorizes the review of civil cases by writ of certiorari granted upon the petition of any party thereto after judgment of the Court of Appeals.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS THE CASE INVOLVES

1. *The Tenth Amendment to the United States Constitution*

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

2. *The First Amendment to the United States Constitution*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

3. *The Fourteenth Amendment to the United States Constitution*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. *42 U.S.C. § 1983*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

5. *Article III, Section 10 of the Nebraska Constitution*

[T]he Legislature shall determine the rules of its proceedings and be the judges of the election, returns, and qualifications of its members, shall choose its own officers, including a Speaker to preside when the Lieutenant Governor shall be absent, incapacitated, or shall act as Governor. . . .

6. *Rule 1, Section 2 of the Rules of the Nebraska Unicameral*

RULE 1—OFFICERS AND EMPLOYEES

A. Election of Officers

. . .
. . .

Sec. 2. Officers To Be Approved. In addition, the Legislature shall advise and consent to the recommendations of the Executive Board of the Legislative Council for the following officers:

Chief Clerk of the Legislature
Assistant Clerk of the Legislature
Sergeant at Arms
Chaplain

7. *Rule 1, Section 21 of the Rules of the Nebraska Unicameral*

RULE 1—OFFICERS AND EMPLOYEES

E. Other Offices

. . .
. . .

Section 21. Chaplain. The Chaplain shall attend and shall open with prayer each day's sitting of the Legislature.

8. *Rule 7 (A), Section 1(b) of the Rules of the Nebraska Unicameral*

RULE 7—PROCEEDINGS AND MOTIONS

(A) Order of Business

Section 1. Meeting Time, Restrictions. . . .

(b) The order of business of the Legislature shall be as follows; except as otherwise provided by the Speaker.

a. Prayer by the Chaplain

b. Roll call

. . .
. . .

STATEMENT OF THE CASE

Respondent invoked the jurisdiction of the district court authorized by 42 U. S. C. § 1983 to challenge the Nebraska Legislature's longstanding tradition of opening each day's legislative sitting with an invocation from the legislative Chaplain.

Respondent is a taxpayer and citizen of the State of Nebraska, and a duly elected member of the Nebraska Unicameral Legislature. Petitioner Palmer is an ordained Presbyterian clergyman, and has served as Legislative Chaplain for every session since 1965. Petitioner Marsh at the time of this action was State Treasurer and was responsible for administering the expenditure of funds compensating the Chaplain monthly and defraying the costs of publishing several hundred copies of prayer books in the legislative years 1975, 1978, and 1979. The remaining petitioners are members of the Legislature's Executive Board.

Pursuant to the internal rules of the Legislature, at the onset of each two year legislative session its Executive Board recommends an individual to serve as Chaplain for that session to the full Legislature for its advice and consent. The Legislature typically sits for three or four months of each year. The Chaplain is compensated in the approximate amount of $320.00 per month by the State Treasurer in the same manner as are all legislative employees at the Legislature's direction for each month of service. The internal rules of the Legislature declare the Chaplain's sole responsibility to be to open each day's sitting with an invocational prayer, which is the first step of each day's official proceedings.

In three past years, 1975, 1978 and 1979, upon motion from the floor, assorted invocations were collected and published in very limited supply at state expense, for distribution to the legislative membership and to the public upon request so long as the supply would last. Two hundred copies of the 1975 book, two hundred copies of the 1978 book, and one hundred copies of the 1979 book were printed.

The relief sought by respondent is a permanent injunction enjoining petitioner members of the Nebraska Legislature's Executive Board from implementing the legislative rules providing for the retention of a Chaplain, and enjoining the current Chaplain, Robert E. Palmer, from assuming the post of Chaplain and receiving compensation from the state in that capacity. He further seeks to enjoin the State Treasurer from expending public funds for the payment of the Chaplain's salary and for the printing and transcription of the daily prayers and their subsequent printing and publication. Respondent finally seeks a declaration that the legislative rules providing for the legislative Chaplain are unconstitutional, void and unenforceable.

Prior to trial, petitioners moved to dismiss the action on grounds of legislative immunity, which motion was overruled. After trial, the district court found that the Establishment Clause of the First Amendment to the Constitution was not violated by having the daily prayers to open each day's sitting, but was violated by compensating a Chaplain and by publishing and distributing the prayer books. The district court distinguished this case from other Establishment Clause cases decided by the Supreme

Court by noting that the prayer practice represented an internal act—that is one directed at the Legislature itself for its own members, rather than toward the public. On the basis of this distinction, the court found that providing for the morning invocations by internal rule did not amount to the "making of a law" as contemplated by the Establishment Clause.

Applying the traditional, purpose-effect-entanglement analysis employed in Establishment Clause cases, the court found a clearly secular purpose for the practice to be bringing the legislators to order by means of brief, solemn and thoughtful act in a traditional manner. It further found the effect of the prayer practice to be primarily secular, declaring that any actual effect of the legislative prayers on religion was virtually nonexistent on the basis of the record made in this case. The court finally found that the prayer practice did not excessively entangle the state in religious affairs.

Beyond the morning prayer practice, however, the district court did conclude that the expenditure of public funds for the Chaplain's salary and the costs of printing the prayer books, and the very publication of the prayer books itself, did violate the Establishment Clause. It was the payment of a Chaplain, the court said, that had a direct and immediate religious effect of securing a continuing relationship with a particular cleric of one denomination, at least for the several-month session of the Legislature. This apparently was deemed to violate the Establishment Clause. The printing and publication of the prayer books was invalidated as having no secular purpose.

Consistent with these findings, the district court dismissed the defendant members of the Executive Board

from the lawsuit, declared the payment of the Chaplain from public funds and the printing at state expense of the prayers in prayer books unconstitutional, and enjoined the State Treasurer and the Chaplain from undertaking such acts.

Petitioners Marsh and Palmer appealed to the Court of Appeals for the Eighth Circuit the district court's judgment regarding jurisdiction of the action, and its finding on the merits that the compensation of the Chaplain violated the Establishment Clause. The ruling as to the printing of prayer books was *not* appealed. Respondent cross-appealed the balance of the judgment finding the underlying prayer practice constitutional. The Court of Appeals affirmed in part and reversed in part the judgment of the district court, employing a significantly different analysis of the case.

The Court of Appeals first ruled that the district court erred in examining the compensation of the chaplain independently from the other elements of the prayer practice since respondent essentially challenged the practice as a whole. Nevertheless, in subsequently declaring the practice as a whole violative of the Establishment Clause, it singled out the retention and compensation of a single chaplain for an extended period of time and the printing of the prayer books as determinative of its inquiry, while at the same time noting that it did not intend to hold legislative prayer practices, or legislative chaplains—even paid chaplains—*per se* unconstitutional. The opinion does not recognize or address the fact that petitioners did not raise the prayer book issue on appeal.

In applying the three-part Establishment Clause test, the court summarily concluded: "[T]he purpose of the

practice as a whole must be to advance and give preference to one religious view over others. There is little other reason for singling out one minister of one denomination for such an extended period of time, . . ." (Exhibit D, p. 11). No reference to any evidence in the record supporting that conclusion is made, nor is the testimony of the Executive Board chairman, that Palmer was retained because he had done a good job over the years and would have been removed if it were thought his retention would be viewed as an endorsement of his religion, acknowledged (T123). Similarly, the opinion does not acknowledge Palmer's testimony that he had "never made salary a point of my being asked to be Chaplain." (Dep., p. 4).

The Court of Appeals also found the Nebraska prayer practice to have the primary effect "unmistakably to advance religion and to give preference to one religious view", (Exhibit D, p. 12), on the basis of its conclusion that Palmer's retention for sixteen years amounted to the Legislature's seal of approval of his religious views, and would have led observers to conclude that the Legislature had an official view on religion. No evidence in the record was cited in support of these findings.

Finally, the court found, again without reference to any compelling evidence in the record in support thereof, that compensating the same clergyperson chaplain for sixteen years engenders serious political division along religious lines amounting to an excessive entanglement between government and religion. After moving for and receiving a stay of the mandate of the Court of Appeals, petitioners filed this petition for a writ of certiorari, seeking review of that court's judgment declaring the Nebraska Legislature's retention and compensation of a single Chap-

lain for an extended period of time violative of the Establishment Clause.

REASONS FOR GRANTING THE WRIT

I.

This case raises substantial jurisdictional questions grounded on Tenth Amendment sovereign immunity, fundamental principles of federalism, and the common law legislative immunity doctrine.

This action is nothing less than an attempt to use the federal judiciary to override the Nebraska State Legislature's will on a matter of purely internal operations, which respondent admits (T21-24). The use of the federal judiciary to interfere in such a manner with the internal proceedings of a state legislature raises the following jurisdictional questions.

A.

Tenth Amendment Sovereign Immunity

In its most notable examination of the Tenth Amendment to the United States Constitution to date, this court determined in *National League of Cities v. Usery*, 426 U. S. 833 (1976), that valid exercises of Congress' legislative power cannot be used in a fashion that would impair the integrity of the states or their ability to function in a federal system. Clarifying this principle further, the court stated that if constitutionally valid exercises of federal legislative power would impair "functions essential to separate and independent existence" of the states, *Id.* at 845,

or would "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions", *Id.* at 852, such exercise would not be permitted.

Petitioners remain steadfast in their contention that maintenance of this action pursuant to the authority of 42 U. S. C. § 1983 would have the precise consequence foreclosed by the *National League of Cities'* decision. Notwithstanding that respondent's complaint meets the technical pleading prerequisites for stating a § 1983 claim, it is unmistakably clear that a grant of the relief he requests would have the effect of displacing the Nebraska State Legislature's freedom to structure for itself its own internal proceedings. Certainly, that freedom is the kind of attribute of state sovereignty contemplated by that decision as protected by the Tenth Amendment from federal interference.

Petitioners are mindful that *National League of Cities* articulated the scope of the Tenth Amendment's restraint on exercises of federal legislative power in the context of certain Commerce Clause legislation, and that the court has expressed reluctance to extend its application to situations involving other kinds of constitutionally authorized exercises of federal legislative power. Further, it is recognized that a determination of the Tenth Amendment's preclusive effect on federal legislation authorizing civil rights lawsuits, such as 42 U. S. C. § 1983, well may turn on considerations not addressed in *National League of Cities.* However, the fact remains that due to the uniqueness of the activities challenged here, the consequence of maintaining this action is precisely that which was of concern to the court in its decision. Indeed, it is this very uniqueness

which sets this case apart from the mainstream of § 1983 lawsuits and which could be acknowledged as warranting only a limited extension of Tenth Amendment restraint on such civil rights lawsuits.

B.

Fundamental Principles of Federalism

Limits on federal interference with state functions and activities do not derive exclusively from notions of state sovereignty and balance of power embodied in the Tenth and Eleventh Amendments. Fundamental principles of federalism have been cited in recent cases as requiring federal judicial restraint where the consequence would be to interfere with state criminal proceedings, *Younger v. Harris*, 401 U. S. 37 (1971), to impair state's civil proceedings, *Huffman v. Pursue, Ltd.*, 420 U. S. 592 (1974), or to obstruct other judicial activities or functions deserving of substantial and proper respect by the federal courts. *Juidice v. Vail*, 420 U. S. 327 (1977).

Rizzo v. Goode, 423 U. S. 362 (1976), extended the doctrine of federal judicial restraint based on principles of federalism and equity beyond cases involving state judicial functions to those concerned with state executive branch functions. Even though the complainants in that case satisfied the technical standing and pleading prerequisites of § 1983, this court indicated that the federal courts still were obliged to discern the real nature of the lawsuit in deciding upon the availability and scope of relief:

> When the frame of reference moves from a unitary court system, governed by the principles just stated, to a system of federal courts representing the

> Nation, subsisting side by side with 50 state judicial, legislative and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief. Doran v. Salem Inn, Inc., 442 U. S. 922, 928, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975).

423 U. S. at 379.

The same consideration is equally warranted where state legislative functions are involved. The substantial interest of the State of Nebraska in the freedom of its Legislature to structure its own internal operations and proceedings could not be more obvious. Maintenance of this action would serve as a precedent for other challenges in federal court to the Legislature's will with respect to a host of internal matters which are and should be political and controversial within the legislative chamber. The recognition that state legislators may not contest the justiciability of outside challenges to their internal deliberations on such matters by invoking the political question doctrine, as their federal counterparts can do, *E'rod v. Burns*, 427 U. S. 347 (1976), compels a greater deference to principles of federalism in exercising federal judicial restraint in entertaining such challenges, particularly where, as here, the complainant has made no effort to seek relief through the state judiciary.

C.

Legislative Immunity

It is now settled that state legislators sued in federal court cannot invoke the Speech and Debate Clause immunity provided by the United States Constitution, they are entitled to invoke common law legislative immunity in appropriate instances. *Lake Country Estates, Inc. v.*

Tahoe Regional Planning Agency, 440 U. S. 391 (1979), *Supreme Court of Virginia v. Consumer's Union*, 446 U. S. 719 (1980). Moreover, the principles determining the scope and application of Speech and Debate Clause immunity for federal legislators are the same as those used in determining the scope and application of common law legislative immunity in civil suits against state legislators. *Supreme Court of Virginia v. Consumer's Union, supra.* Common law legislative immunity properly invoked by state legislators or their aides is absolute; it bars both damage and perspective injunctive actions. *Id.* at 731-733.

Respondent has sought to enjoin the following specific acts mandated by the internal rules of the Legislature: (1) the biennial vote of its Executive Board by which an individual is recommended to serve as Chaplain for the ensuing session, (2) the giving of the invocation each morning by the Chaplain to begin each day's official proceedings, (3) the monthly payment of the Chaplain for each month the Legislature sits, and (4) the printing of prayer books. The printing of prayer books has been abandoned by petitioners, was not appealed to the Court of Appeals, and is not at issue herein. The remaining acts are "legislative acts" to which common law legislative immunity applies if they are "things generally done in a session of the house by one of its members in relation to the business before it", *Kilborn v. Thompson*, 103 U. S. 168, 204 (1881), or take place in the "sphere of legitimate legislative activity", *Tenney v. Brandhove*, 341 U. S. 367 (1950), or are things "generally said or done in the house or the senate in the performance of official duties", *United States v. Brewster*, 408 U. S. 501, 512 (1972), or are an "integral part of the deliberative and communicative processes by

which Members participate in committee and house proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either house." *Gravel v. United States,* 408 U. S. 606, 625 (1972).

The acts respondent challenges meet the "legislative act" standard. The vote recommending a Chaplain occurs during a regular meeting of the Executive Board which clearly is a legislative proceeding, and is a recurring matter of business for that body. That the recommendation comes in a form of a vote is determinative of legislative immunity. *See, Kilborn v. Thompson, supra* at 204-205, *United States v. Brewster, supra* at 514. Moreover, the Executive Board's recommendation of a Chaplain, commanded by legislative rule, is an official duty of the members comprising the board. The Legislature's decision that the first step in the official proceedings of each day should be an invocation given by a Chaplain who serves as an ex officio officer respects a matter which the Nebraska Constitution has placed within the jurisdiction of the Legislature exclusively. *Gravel v. United States, supra* at 625, made operational by *Supreme Court of Virginia v. Consumer's Union, supra.*

The morning invocation of the Chaplain similarly is a "legislative act". It is speech. It occurs in the legislative chamber during official proceedings, and is in relation to the business before the Legislature. The morning prayer is commanded by the rules of the Legislature, and is thus, an official duty of the Chaplain. Since the Legislature has intended the invocation serve as the first step of the daily official proceedings, it clearly respects a mat-

ter which the Nebraska Constitution has placed exclusively within the jurisdiction of the Legislature.

The payment of the Chaplain each month is carried out by the State Treasurer at the direction of the Nebraska Legislature pursuant to the latter's statutory authority to compensate its employees and provide for its own administration. The Treasurer acts as a functionary of the Legislature in paying the Chaplain monthly. That such tasks may be more administrative or operational in nature than the other acts complained of, compels no finding that it is any less a part of the deliberative and communicative process by which legislators participate in legislative proceedings. *Gravel v. United States, supra* at 611, footnote 6.

In rejecting respondents' legislative immunity claim, The Court of Appeals relied significantly on its observation that no speech activity by any *'egislator* was at issue, nor was individual prayer by elected legislators at issue. Thereby, the court apparently presumed that legislative aides or functionaries who are not elected members of the legislative body are not entitled to claim legislative immunity in appropriate situations. This is totally contrary to expressions from this court that non-legislator aides, assistants, or officials are entitled to invoke such immunity for "legislative acts" which would have been privileged had the legislators themselves undertaken them. *Gravel v. United States, supra, Doe v. McMillan,* 412 U. S. 306 (1973).

The Court of Appeals additionally found that the deliberative process of the Legislature will not be impaired to any degree by judicial resolution of petitioner's claim, and that the prayer practice bore no substantive relation

to the process of enacting legislation, citing only *United States v. Brewster, supra,* in support therefor. This summary conclusion failed to take into account the other above-cited legislative immunity decisions of this court, some of which occurred subsequent to *Brewster* and clarified it considerably.

II.

The decision of the Court of Appeals on the merits is in direct conflict with the decision of the Supreme Court of Massachusetts, and appears to a significant degree to be in conflict with the expressions of the United States Supreme Court, on the same federal constitutional question.

In *Colo v. Treasurer and Receiver General,* 392 N. E. 2d 1195 (Mass. 1979), the Supreme Court of Massachusetts decided an action brought pursuant to the Establishment Clause to enjoin the expenditure of public funds to pay the salaries of the Massachusetts' legislative chaplains and for a declaration that the state statute authorizing such expenditures was unconstitutional. The chaplains had served for 24 and 20 years respectively. Their primary duty was to open each daily session with a brief prayer. Visiting ministers of various faiths, usually at the request of the members of the Legislature, occasionally gave the opening prayer without compensation. At the time of the action the Senate Chaplain received $9,550 annually for his services and the House Chaplain received $7,883 annually. While the specific act alleged as unconstitutional in the complaint was the expenditure of public funds, it was the underlying prayer practice which the court assessed against the purpose-effect-entanglement test of Establish-

ment Clause cases. The court concluded that no Establishment Clause violation had occurred.

The facts of and legal issues raised by the Massachusetts case are virtually identical to those presented by this action. Moreover, the Massachusetts Supreme Court specifically addressed the tenure of the chaplains independent from the underlying prayer practice, said tenure having been claimed to be an equal protection violation. While the question was resolved expressly on equal protection grounds, it clearly had been brought to the attention of the Massachusetts Supreme Court and its finding that no Establishment Clause violation had occurred can be taken as a determination that a showing of a lengthy tenure alone does not necessarily invalidate an otherwise constitutional prayer practice. So viewed, the decisions of the Massachusetts Supreme Court and the Court of Appeals for the Eighth Circuit are in direct conflict.

Numerous justices sitting on this court have had occasion to strongly suggest that legislative prayer practices such as that in Nebraska present no Establishment Clause problem. *Zorach v. Clauson*, 346 U. S. 306, 312-313 (1952); *School District of Abington v. Schempp*, 347 U. S. 203, 214, 299-300 (1963). In *McCollum v. Board of Education*, 333 U. S. 203 (1948), Mr. Justice Reed expressed this view when referring to the opening prayers offered by United States Senate Chaplains, and citing by a footnote the Senate's internal rules providing for same. *Id.* at 253. *See also*, Mr. Justice Stewart's discussion in *Engel v. Vitale*, 370 U. S. 421, 446 (1962). United States Senate rules also provide for the compensation of a chaplain in addition to his mere retention. *Murray v. Morton*, 505 F. Supp. 144 (D. D. C. 1981). Thus, while these expressions may not

have been intended by their authors as definitive conclusions, they nevertheless do reflect a degree of conflict with the Court of Appeals' decision.

III.

The merits of this case present important constitutional issues which need be addressed by this court.

Establishment Clause cases typically fall into two categories: (1) those involving governmentally supported or financed programs or activities undertaken outside the halls of government; and (2) those involving activities or conduct having religious connotations undertaken within the operation or halls of government. While this court has freely admitted that the principles of the Establishment Clause do not lend themselves to easy application from one case to another, it is nonetheless true that most of the decisions forming the core of contemporary Establishment Clause law have been handed down in cases of the first variety.

However, a trend toward increased litigation of cases such as this, representing the second variety, clearly is discernible. *See, Fox v. City of Los Angeles*, 587 P. 2d 663 (Cal. 1978) (illuminating city hall windows with a cross during Easter), *Hall v. Bradshaw*, 630 F. 2d 1018 (4th Cir. 1980) (motorist's prayer on state highway maps), and *Voswinkel v. City of Charlotte*, 495 F. Supp. 588 (W. D. N. C. 1980) (police department chaplain). Application of the purpose-effect-entanglement analysis and determination of the threshold showing required to support a finding of unconstitutionality are particularly difficult in such cases because of the dearth of guidance from this court. This action presents the opportunity for the court

to take a substantial step in filling this void in its Establishment Clause pronouncements.

Moreover, while similar challenges to state legislative prayer practices around the country specifically are now ripe for litigation, the decision of the Court of Appeals for the Eighth Circuit provides virtually no guidance in resolving them. Confined in its examination by its prior decision in *Bogen v. Doty*, 598 F. 2d 1110 (8th Cir. 1979), validating opening invocations at county board meetings, the Court of Appeals was forced to tailor its opinion specifically to the Nebraska practice, and in so doing left several critical questions certain to arise elsewhere unresolved. In holding that the retention of one particular chaplain for an "extended period of time" may transform an otherwise constitutional practice into an unconstitutional one, the court failed to give any guidance as to what constitutes an extended period of time. Further, the "viewed as a whole" analysis employed by the court was felt compelled only because respondent challenged the entire legislative prayer practice as a whole, rather than only one element thereof. This leaves unresolved, as the court hinted, the question of what analysis is proper when only one element is questioned, for example only the compensation of a legislative chaplain.

This question is hardly academic, for just such a challenge to the compensation of the federal House and Senate Chaplains is currently pending in the federal courts in the District of Columbia. The district court there, taking care to point out that the complaint challenged only the compensation of the chaplains, and not the 200 year old practice of their appointment or their morning prayers, dismissed the original complaint for lack of standing and

justiciability. *Murray v. Morton, supra.* A three-judge panel of the Court of Appeals to the District of Columbia reversed the district court's dismissal, but on May 25, 1982, a rehearing before the court en banc was ordered. Thus, it is highly likely that some, if not all, of the issues petitioners seek now to raise before this court eventually will also be raised by the parties to that action.

If the Court of Appeals' decision is correct, this court should take the opportunity to so find in a manner that will be helpful in resolving similar questions in other states. If wrongly decided, this court should take the opportunity to so find and foreclose at an early date similar lawsuits which otherwise surely can be anticipated.

IV.

The decision of the Court of Appeals on the merits was erroneous.

The Court of Appeals' decision that the Nebraska legislative prayer practice violated the Establishment Clause turned on two factors: (1) the printing of prayer books in certain years, and (2) the length of tenure of the current chaplain. Reliance on these factors by the court in its finding of unconstitutionality was clearly erroneous.

Intending not to contest the district court's judgment respecting the printing of the prayer books, but desiring review of its judgment invalidating the chaplain's compensation, petitioners appealed only that portion of the court's judgment dealing with the latter issue in reliance on Federal Rule of Appellate Procedure 28 and the rules of the Eighth Circuit Court of Appeals providing for the appeal of only a portion of a district court's judgment. Respondent's cross-appeal bore only on the propriety of the daily prayer and similarly did not put the printing of the prayer books into issue, no doubt because he had prevailed there-

on at trial. Thus, the Nebraska legislative prayer practice which was before the Court of Appeals for review was one which did not include the printing of the prayer books. In grounding its decision in large part on the printing of the prayer books, the court put the appeal in a posture not intended by the parties, thereby rendering a judgment which fails to clearly resolve the constitutionality of the specific legislative prayer practice the parties desired be addressed. In this manner, the court committed grave error.

Absent consideration of the prayer book issue, the sole feature of the Nebraska legislative prayer practice distinguishing it from what the Court of Appeals itself indicated would be a constitutional practice, is the retention and compensation of the Nebraska Chaplain for an extended period of time. For this reason, the court concluded that the purpose of the legislative prayer practice as a whole must be to advance and give preference to one religious view. However, it is noteworthy that the court did not refer at all to any evidence in the record supporting this conclusion, for none exists. The only evidence directly on this point was Chaplain Palmer's testimony that compensation had never been a condition to his service, and Executive Board Chairman Lewis' testimony that Palmer was retained for several consecutive years because it was felt he had done a good job, but would have been removed had his retention been perceived as an endorsement of his religious persuasion (*Supra,* pp. 10-11). Against this background, the determination of the Court of Appeals on this issue was clearly erroneous for relying on factual inference rather than the evidence in the record.

Additionally, the Court of Appeals determined a primary effect of Palmer's continued retention was a perception that the Legislature had an official view on re-

ligion. Again, there is absolutely no evidence in the record to support a finding of any such perception, or that it was engendered solely because of the chaplain's particular length of tenure. More importantly, even if such a perception did exist, at the very most it could amount only to a minimal accommodation of religion by the State Legislature which does not contravene the Establishment Clause. The Court of Appeals totally ignored numerous decisions of this court indicating unmistakably that indirect or incidental accommodations of religion by the state are not thereby prohibited. *Committee for Public Education v. Nyquist,* 413 U. S. 756, 760 (1973); *Lemon v. Kurtzman,* 403 U. S. 602, 604 (1971).

CONCLUSION

For the foregoing reasons, the petitioners' application for writ of certiorari should be granted.

Respectfully submitted,

FRANK MARSH, State Treasurer; ROBERT E. PALMER, Chaplain and Officer of the Nebraska Unicameral; FRANK LEWIS, JOHN DeCAMP, ROBERT L. CLARK, TOM FITZGERALD, STEVE FOWLER, HOWARD A. LAMB, RICHARD D. MARVEL, LORAN SCHMIT, and JEROME WARNER, in their official capacity as members of the Executive Board of the Legislative Council of the Nebraska Unicameral, Petitioners,

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APPENDIX

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV79-L-294

ERNEST CHAMBERS,

Plaintiff,

vs.

FRANK MARSH, et al.,

Defendants.

MEMORANDUM AND ORDER

(Filed November 24, 1980)

The plaintiff Chambers, a member of the Nebraska Legislature, brought this civil rights action against the state treasurer, the legislative chaplain, and the members of the Executive Board of the Legislative Council of the Nebraska Legislature, alleging that the giving of the morning prayer at legislative sessions, the compensation of the chaplain from public funds, and the printing of the prayers with public funds have deprived him of his First Amendment constitutional right to be free of establishment of religion. The plaintiff asks this court to enjoin the enforcement of and declare unconstitutional Legislative Rule 1, Sections 2 and 21, which provide for the election of the chaplain and prescribe his or her duties. The defendants have filed a motion, filing 11, to dismiss the plaintiff's action against them on the basis of their possession of absolute legislative immunity from actions of this sort.

It is true, as the defendants contend, that § 1983 did not abrigate the common law immunity of state legislators,

regardless of whether the relief sought in the civil rights action is damages or, as here, prospective relief. *Supreme Court of Virginia v. Consumers Union,* 48 U. S. L. W. 4620, 4623, 100 S. Ct. 1967 (1980); *Tenny v. Brandhove,* 341 U. S. 367, 376 (1951). However, the common law immunity afforded state legislators, which is construed to be similar to that afforded Congressmen under the Speech and Debate Clause, see *Consumers Union, supra,* 48 U. S. L. W. at 4623-4624, does not extend beyond the "legitimate legislative sphere." *Gravel v. United States,* 408 U. S. 606, 624-625 (1972); *Doe v. McMillan,* 412 U. S. 306, 313 (1973); and *Eastland v. United States Servicemen's Fund,* 421 U. S. 491, 503 (1975). Therefore, if it is determined that the acts of the defendant legislators in this case do not fall within the sphere of legitimate legislative activity, legislative immunity is not available. *Eastland,* supra, 421 U. S. at 503; *Green v. DeCamp,* 612 F. 2d 368, 371 (C. A. 8th Cir. 1980).

In speaking of the "legitimate legislative sphere," the Supreme Court of the United States in *Hutchinson v. Proxmire,* 443 U. S. 111, 126-127 (1978) said:

> " 'Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, *they must be an integral part of the deliberative and communicative processes* by which Members participate *in committee and House proceedings* with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either house, but "only when necessary to prevent indirect impairment of such de-

liberations."' *Gravel v. United States,* 408 U. S. at 625 (quoting *United States v. Doe,* 455 F. 2d 753, 760 (Cal. 1972) (emphasis added."

Therefore, the questions presented herein are (1) whether the selection and compensation of the chaplain, the giving of prayers by the chaplain, and the recording and printing of those prayers at state expense are activities which fall within the "legitimate legislative sphere" and, if so, (2) whether the defendants Marsh and Palmer, who are not state legislators, are protected by this same legislative immunity which extends to both legislators and their aids. See *Doe v. McMillan,* 412 U. S. at 312-313.

It is apparent from the pleadings and the uncontroverted facts set out in the pretrial order that the challenged activities of the defendants do not fall within the definition of legislative activities. The selection and compensation of the chaplain and the recording and printing of the prayers given by the chaplain are in no way an "integral part of the deliberative and communicative processes" respecting the functioning of the legislative process. It is only those acts done in the course of the process of enacting legislation which are protected by legislative immunity. See *United States v. Brewster,* 408 U. S. 501, 513-516 (1972).

As noted in the plaintiff's brief in opposition to the defendants' motion to dismiss, the activities of the defendants are more akin to "enforcement" activities rather than "legislative" activities. In *Supreme Court of Virginia v. Consumers Union,* supra, the Supreme Court of the United States held that while the Virginia Supreme Court was immune from suit when acting in a *legislative* capacity (adopting rules of practice for attorneys), the court and

its chief justice were properly held liable in their *enforcement* capacities. Such an analysis is similarly applicable to the instant case, where the plaintiff is requesting not that this court enjoin the defendants from enacting Rule 1, Sections 2 and 21, but that this court enjoin the "enforcement" of those sections of the rule.

Furthermore, as observed in *United States v. Brewster,* 408 U. S. at 507, the constitutional immunity provided Congressmen was not "simply for the personal or private benefit of the Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." The defendants in their answer claim that the activities which are the subject of this action are "constitutionally permissible religious accomodations [sic] by the Legislature" and are "consistent with and protected by the rights of the members of the Legislature bestowed by the free exercise clause of the First Amendment of the Constitution of the United States." While these defenses may or may not be valid, they are indicative that the activities complained of are carried on for the "personal or private benefit" of the legislative members, rather than for the purposes of the legislative process.

Because I find that the activities of the defendant legislators do not fall within the "legitimate legislative sphere," there is no need to reach the question of whether the defendants Marsh and/or Palmer are "aids" for the purposes of legislative immunity.

IT THEREFORE HEREBY IS ORDERED that the defendants' motion to dismiss on the grounds of legislative immunity, filing 11, is denied.

Dated November 24, 1980.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV79-L-294

ERNEST CHAMBERS,

Plaintiff,

vs.

FRANK MARSH, State Treasurer; ROBERT E. PALMER, Chaplain and Officer of the Nebraska Unicameral; FRANK LEWIS, JOHN DeCAMP, ROBERT L. CLARK, TOM FITZGERALD, STEVE FOWLER, HOWARD A. LAMB, RICHARD D. MARVEL, LORAN SCHMIT, and JEROME WARNER, in their official capacity as members of the Executive Board of the Legislative Council of the Nebraska Unicameral,

Defendants.

JUDGMENT

(Filed December 24, 1980)

Pursuant to the accompanying memorandum of decision of today,

IT IS ORDERED, DECLARED AND ADJUDGED:

1. That the paying from public funds of a chaplain to open daily sessions of the Nebraska Unicameral Legislature is violative of the Establishment Clause of the First Amendment to the Constitution of the United States;

2. That the printing at state expense of prayers delivered by a chaplain at legislative sessions and distributing them to members and nonmembers of the Nebraska Unicameral Legislature contravene the Establishment Clause of the First Amendment to the Constitution of the United States;

3. That for reasons stated in the memorandum of today,

A. The defendant Frank Marsh, State Treasurer, is enjoined from expending public funds for the payment of the salary of the defendant Robert E. Palmer, Chaplain and Officer of the Nebraska Unicameral Legislature or for printing of prayers,

B. The defendant Robert E. Palmer, Chaplain and Officer of the Nebraska Unicameral, is enjoined from accepting public funds as salary as Chaplain of the Nebraska Unicameral Legislature, and

C. The action is dismissed as to the defendants other than those named in paragraphs 3A and 3B of this judgment.

Dated December 24, 1980.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV79-L-294

ERNEST CHAMBERS,

Plaintiff,

vs.

FRANK MARSH, State Treasurer; ROBERT E. PALMER, Chaplain and Officer of the Nebraska Unicameral; FRANK LEWIS, JOHN DeCAMP, ROBERT L. CLARK, TOM FITZGERALD, STEVE FOWLER, HOWARD A. LAMB, RICHARD D. MARVEL, LORAN SCHMIT, and JEROME WARNER, in their official capacity as members of the Executive Board of the Legislative Council of the Nebraska Unicameral,

Defendants.

MEMORANDUM OF DECISION

(Filed December 24, 1980)

At stake is the practice of having each day's proceedings of the Nebraska Unicameral Legislature open with a prayer by a chaplain who is paid with public funds and of having those prayers published at state expense and distributed to members and nonmembers. I conclude that the Establishment Clause of the First Amendment to the Constitution of the United States is not breached by having the prayers, but is breached by paying the chaplain to say them and by publishing and distributing them.

THE FACTS OF THE CASE

Ernest Chambers is a duly elected state senator of the Nebraska Unicameral Legislature, District 11, a citizen

and taxpayer of the State of Nebraska, and is not a Christian.

At the beginning of each session of the Nebraska Unicameral Legislature the Executive Board of the Legislative Council of the Legislature recommends the selection of court officers, one of them being called "chaplain." The selection of the chaplain is provided for by Rule 1, section 2, of the Rules of the Nebraska Unicameral, Officers and Employees, which says:

> "In addition, the Legislature shall advise and consent to the recommendations of the Executive Board of the Legislative Council for the following officers: . . . Chaplain."

Rule 1, section 21, of the Rules states:

> "The Chaplain shall attend and shall open with prayer each day's sitting of the Legislature."

Robert E. Palmer, one of the defendants, has been the duly selected chaplain of the Nebraska Legislature since 1965. His salary is $319.75 per month for each month the legislature is in session. The salary is paid from the general funds of the State of Nebraska and is disbursed by the State Treasurer, the defendant Frank Marsh. The prayers at each day's opening are recorded each day in the Legislative Journal. In the years 1975, 1978 and 1979 prayer books containing selected offerings given during the legislative sessions of those years were prepared pursuant to motions made and approved on the floor of the legislature. Copies of the book were distributed to the legislative membership and to other individuals upon request. Two hundred copies of the 1975 book were printed at state expense totaling $70.01; 200 copies of the 1978

book were printed at state expense totaling $260.40; and 100 copies of the 1979 book cost the state $128.15. Robert E. Palmer is and for a number of years prior to the filing of this action has been an ordained clergyman in the State of Nebraska of the Christian faith, is head of staff of Westminster Presbyterian Church in Lincoln, Nebraska, and has been since 1963.

The defendant Frank Marsh is the duly elected State Treasurer, charged with the payment of public funds as salaries to members of the legislature and particularly to the defendant Robert E. Palmer. The other defendants are members of the Executive Board of the Legislative Council of the Nebraska Unicameral Legislature and are duly elected state legislators.

Other findings of fact, developed as a result of a trial in this court, will be noted as they become appropriate to the discussion throughout this memorandum.

DISCUSSION

I.

The turmoil over the proper interplay between government and religion in America antedates the Constitution and has been continual throughout the Republic's history. The struggle has been to find that decent accommodation which allows full virility of government within its distinct sphere and full virility of religion within its distinct sphere. When the spheres have overlapped, sparks have often flown.

The Constitutional Congress in 1774 opened its session with prayer over the objections of John Jay and John

Rutledge based upon the diversity of religious preferences in that body.[1] A decade later the Constitutional Convention in Philadelphia failed to adopt Benjamin Franklin's motion for an opening prayer, but the Congress which emerged from the Convention took on the custom of the Continental Congress of having its sessions opened with prayer and has continued with that custom to this day. It is probably true that the legislatures of each of the fifty states begin each session with an opening prayer, and it is has been said that eighteen states, as well as the United States Congress, employ a chaplain or chaplains to give the prayers.[2] The constitutionality of employment of legislative chaplains by the United States Congress was challenged in *Elliott v. White*, 57 App. D. C. 389, 23 F. 2d 997 (1928), but the case was dismissed on the ground that the plaintiff, as a taxpayer, had no standing to bring the complaint under the rule of *Frothingham v. Mellon*, 262 U. S. 447 (1923).[3]

From the beginning of our country's life, friction has come between those who favor and those who disfavor having prayers in legislative chambers by paid or unpaid members of the clergy. New York, for example, had some stormy times. When the state's first constitution was adopted, it stated that all members of the clergy were ineligible for any "civil . . . office or place within this state."

For about fifty years thereafter no prayer opened the legislative sessions and no chaplains for the legislature were allowed. By statute in 1829, however, payment with civil funds of chaplains for the legislature began by both houses. So many petitions against the practice—whether against the appointments or the paying is not

known—were received that a select committee was commissioned to study the matter and report. It did so, urging abolition of any statute authorizing chaplaincies, as being unconstitutional. The legislature repealed the statute authorizing payment of the chaplains, but did not directly resolve the principle of legislative chaplaincies, as such, in the state.[4]

Nebraska's use of a chaplain for opening of its daily legislative sessions began as early as 1855, twelve years before statehood.[5] The laws of 1867 provided that the chaplain would be a salaried officer or employee of the House of Representatives with the duty of opening the session of each house of the legislature with prayer.[6] The statutes continuously made provision for a chaplain with that duty until 1973, when the present statute was enacted, declaring that the Executive Board of the Legislative Council was to make recommendations for "such other officers as may be deemed necessary."[7] The rules of the Nebraska Unicameral since then have required the Executive Board's recommending a chaplain with the duty of attending and opening each day's sitting with prayer.

II.

The Establishment Clause of the First Amendment to the Constitution of the United States is:

> "Congress shall make no law respecting the establishment of religion. . . ."

That clause is made applicable to each state by the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940). For a state, then, the clause could be said to read, "A legislature shall make no law respecting the

establishment of religion." Although a broad statement misses the nooks and crannies, it may be helpful conceptually to say that the clause forbids a legislature from making any law that tends to firm up or support religion or to prefer one branch of religion or one religious belief over another. From that can begin an analysis of the specific features of the practice being challenged here.

In distinction from cases decided by the Supreme Court of the United States under the Establishment Clause, this case springs from a prayer practice that is, for the most part, an internal act—that is, one directed at the governmental unit itself or its own members. The legislature's causing invocational prayers and the prayers themselves are for the legislators' own benefit. Any hearing of the prayers by anyone other than the legislators is quite coincidental. The legislators, during the saying of the prayers, are not in their law-making stance vis-a-vis the public. Such an internal or in-house practice is not well suited to analysis by standards developed for judging practices mandated by governmental bodies upon nonmembers of the bodies, such as prayers and bible reading by or for public school children, as in *Engel v. Vitale,* 370 U. S. 421 (1962), and *Abington School District v. Schempp,* 374 U. S. 203 (1963), or posting of the Ten Commandments on the wall of a public classroom, as in *Stone v. Graham,* — U. S. —, 49 U. S. L. W. 3369 (11-17-80), or the use of funds collected from taxpayers to provide financial aid to nonpublic schools, as in *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U. S. 756 (1973).

The First Amendment, through the Fourteenth, declares that state legislatures shall "make no law respect-

ing the establishment of religion." It occurs to me that not everything that a legislature does is "making" a "law." It makes a law when it decrees that *someone else* must do something. I doubt that allowing prayer for or by its own members is "making a law" in any sense. Neither what legislators do for and by themselves nor what a legislature does for and by itself with no significant impact on anyone else is the making of laws. A legislator walks to church for worship; he or she is not thereby making a law. Each of the legislators walks to church for worship—even to the same church; they are not thereby making a law. A legislator, or some legislators, or all the legislators hear a prayer in their chamber or offices; they are not thereby making a law. The legislature by majority vote invites a clergyman to give a prayer; neither the voting nor the inviting nor the giving nor the hearing of the prayer is making a law.

On this basis alone, it seems to me, I must hold that the saying of prayers, per se, in the legislative halls at the opening of each session is not prohibited by the First and Fourteenth Amendments.

Bogen v. Doty, 598 F. 2d 1110 (C. A. 8th Cir. 1979), reaches the same conclusion through the test promulgated in *Nyquist*, supra—the purpose-effect-entanglement test.[8] If the same test is put to the Nebraska legislative practice, aside from payment of the chaplain and the printing at public expense and distributing of the prayers, the result is the same as in the *Bogen* case. There is reflected by the practice a clearly secular purpose: bringing the legislators to order by means of a brief, solemn and thoughtful act in a traditional manner. To say that the prayers have no religious purpose would reach incred-

ibility; they do indeed have a religious purpose for the chaplain and those who choose to listen for spiritual reasons. The prayers also have a secular purpose, and it is genuine enough and strong enough to meet the constitutional measurement.

As to the effect of the practice of an invocation, it is in fact primarily secular. Irrespective of what some persons might hope for or wish to be true, the actual effect of these prayers on religion, I am persuaded by the record made in this case, is virtually nonexistent. The problem is not new. James Madison observed with respect to prayers in Congress in his day that "the daily devotions conducted by these legal Ecclesiastics [were] already degenerating into a scanty attendance and a tiresome formality."[9] The constitutional test is not, as the plaintiff asserts, whether the prayers have any effect or *could have* some effect. The test, rather, is whether the primary effect is to advance or inhibit religion. *Nyquist,* supra, 413 U. S. at 773, and *Abington,* supra, 374 U. S. at 222. The primary effect of the prayers, I find as a matter of fact, is neither to advance nor to inhibit religion. Other expressions have been used to state the "primary effect" idea. It must not have the "direct and immediate effect of advancing religion," as opposed to "a remote and incidental effect." *Nyquist,* supra, at 784, n. 39. That revision of wording, carrying perhaps a stricter test, does not change my findings here. The having of prayers in the legislature of Nebraska does not have a direct and immediate effect of advancing or inhibiting religion.

For me or any other judge to say that these particular prayers have no effect upon the spiritual life of in-

dividual senators would be presumptuous, and I do not say it. Whether a prayer is vibrant or flat or irritating or irrelevant in a privately spiritual sense is too personal for a judge to decide, except as to himself. It is at this point that I find the effect test, which was developed in other settings by the Supreme Court, awkward to apply to cases, such as this one, in which the religious act is done by and for the legislators themselves, rather than by and for someone else at the legislators' direction. The test can be adjusted to this case by saying that my assignment is to decide whether the practice of saying prayers in the legislature is advancing or inhibiting religion in religion's institutional or generic sense. As to that, I find that it is not. There is neither hurting nor helping of institutional or generic religion or any subpart of it. The same result obtains whether I rely, on the one hand, upon the opinions of the witnesses in this case as to the actual effect, or, on the other hand, upon evidence of the nature of the practice and my view of the probable consequences rationally to flow from that nature.

It is true, as the plaintiff's counsel point out, that the Supreme Court of Nebraska has said: "Prayer is always worship."[10] It is also true that the Supreme Court of the United States has said:

> "The nature of such a prayer [a solemn avowal of divine faith and supplication for the blessings of the Almighty] has always been religious. . . ."[11]

Nonetheless, neither court was declaring that prayer can have no possible effect other than one that is primarily religious or that prayer always has a direct and immediate effect of advancing religion. Praying by its nature may be *always* religious; its significant effect may be—and in the context of this case is—otherwise.

One worthy admonition for us in this area is to avoid being tightly clutched by the particular words used in a different setting by an opinion writer. Chief Justice Burger reminded us in *Walz v. Tax Commission*, 397 U. S. 664, 668 (1970):

> ". . . In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."

The plaintiff argues that the effect test is failed if the secular effect could be achieved without using a religious means. I am not able to accept that as a flat constitutional proposition, and the plaintiff's counsel has cited no case for it, except a concurring opinion of Justice Brennan in *Abington School District v. Schempp*, supra, 374 U. S. at 281, and *Ring v. Grand Forks Public School District No. 1*, 483 F. Supp. 272, 274 (U. S. D. C. N. D. 1980). When Justice Brennan made that statement, however, he was not speaking for the court and was not speaking of prayers in legislative halls. Indeed, later in that same concurring opinion he did speak of prayers in legislative chambers and said they "might well represent no involvements of the kind prohibited by the Establishment Clause." 374 U. S. at 299. The *Ring* opinion merely cited the Brennan concurring opinion in *Abington* and does not have to do with legislative prayers or chaplains.

Distinguishing this case from the school-prayer and bible-reading cases is not difficult. I agree with the court

in that respect in *Colo v. Treasurer and Receiver General,* Mass. 392 N. E. 2d 1195, 1200 (1979):

> ". . . The purpose of a school is to teach impressionable children, many of whom, because of their ages, cannot be expected to comprehend that school-sponsored prayers are not necessarily 'lessons' to be learned like other aspects of the school program. . . . By contrast, mature legislators may reasonably be assumed to have fully formed their own religious beliefs or non-beliefs. The provision for a ceremonial moment of meditation at the opening of the . . . sessions is unlikely to advance religious belief among the legislators or their constituency, even if it does give recognition to the traditional place that prayer has occupied in such a ritual for two centuries."

See, also, *State ex rel. Finger v. Weedman,* 55 S. D. 343, 226 N. W. 348 (1929).

Moreover, the voluntariness of attendance makes a difference. The children are in school mandatorily; the senators are not in the senate mandatorily, but by choice.[12] While voluntariness is properly a consideration under the Free Exercise Clause of the First Amendment,[13] it is also a factor in assessing the effect of a practice under the Establishment Clause. See *Abington,* supra, concurring opinion of Justice Brennan, at pp. 299-300, saying:

> "Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect. . . ."

Senator Chambers, although personally offended by the practice of having the prayers and by their content, has had only minor inconvenience in absenting himself and has suffered no significant obloquy as a result of his non-attendance.

Excessive entanglement is the third part of the analysis used by the Court of Appeals in *Bogen v. Doty*, supra. As in the *Bogen* case, I think that the saying of the prayers alone entangles the state in religious affairs only nominally. The entanglement is not excessive. The court in *Bogen* cautioned the state governmental unit of the "quagmire" of excessive entanglement which may result from refusing volunteers of one religious persuasion while inviting others to give prayers. *Bogen*, 598 F. 2d at 1114. The same quagmire may be near in Nebraska, but the record is so far barren of the legislature's having entered it.

III.

Paying a salary to the chaplain and paying for and causing the printing of prayer books containing selections from the chaplain's legislative offerings, all at the taxpayers' expense, are in a different posture.[14] Directing the treasurer to pay tax money either to the chaplain or to a printer for prayer books is making a law. It is done by the legislature in its governmental capacity and imposes obligations upon nonmembers. It respects religion because it has an immediate and direct effect, substantial in scope, in advancing religion.

The process of printing and distributing books of prayers suffers an additional defect: It has no secular purpose. Whereas an invocation offers the rewards of a starting of the business of the day in a thoughtful mood and the extension of a tradition, the prayer book is devoid of any such goals, and no other secular purpose has been suggested by counsel. The use of the prayer book does not fall into a category of private meditational material

for the legislators, because distribution has been to non-legislators as well as to legislators.[15]

The Supreme Court of the United States has mapped out the road regarding payment of public funds for religious activities. The federal government cannot give unrestricted construction funds or loans to sectarian colleges, because the money could be used for a religious need.[16] A state cannot loan religiously neutral equipment, such as tape recorders and laboratory supplies to non-public schools, because the ultimate effect of the state's activity might be a religious one.[17] A state cannot return a portion of a private school's tuition fees to parents, because the ultimate effect might be a religious one.[18] The court in *Hunt v. McNair*, 413 U. S. 734, 743 (1973), said:

> "Aid normally may be thought to have a primary effect of advancing religion . . . when it funds a specifically religious activity in an otherwise substantially secular setting."

The chaplain's salary is no small amount, but the amount is immaterial.

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."
>
> *Everson v. Board of Education*, 330 U. S. 1, 16 (1947).

> "The imposition of taxes to pay ministers' salaries . . . aroused their indignation. It was these feelings which found expression in the First Amendment."
>
> *Id.*, at 11.

The direct and immediate religious effect of Nebraska's funding a chaplain's salary is in securing a firm

and continuing relationship with a particular cleric of one denomination to the virtual exclusion of all others for at least the several-month session of the legislature. That does not mean that no clergypersons of other religious persuasions are afforded an opportunity to offer opening prayers. Over the years the chaplain has asked others to fill in for him when he is absent. From time to time various senators have asked whether their own clergypersons might be invited, and in those instances the chaplain has always honored the requests, including one of the Jewish faith. Nevertheless, the chaplain for fifteen years has been of one faith, of one denomination, of one set of religious beliefs, embodied in one person. Use of public money to finance that arrangement—and to finance the printing for distribution to members and nonmembers of the resulting prayers—has resulted in the placing of "the power, prestige and financial support of government . . . behind a particular religious belief" or set of beliefs, which the Establishment Clause is designed to prevent. *Engel v. Vitale*, 370 U. S. 421, 431 (1963).

> "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."
>
> *Id.*, 370 U. S. at 435.

The result of this holding is that prayers may be had in the legislative hall, but not at public expense, and those prayers may be published and distributed, but not at public expense. That distinction is not new. James Madison, the author of the First Amendment's Religion Clauses,[19]

participated in the selection of the first Congressional chaplain but later expressed the opinion that such a chaplaincy should be at the members' own expense. He said:

> "If Religion consist in voluntary acts of individuals, singly, or voluntarily associated, and it be proper that public functionaries, as well as their Constituents should discharge their religious duties, let them like their Constituents, do so at their own expense. How small a contribution from each member of Congress would suffice for the purpose? How just would it be in its principle? How noble in its exemplary sacrifice to the genius of the Constitution; and the divine right of conscience? Why should the expense of a religious worship be allowed for the Legislature, be paid by the public, more than that for the Executive or Judiciary branch of the Government?"
>
> Pfeffer, *Church State and Religion* (rev. ed. 1967), p. 249.

I have not dealt separately with the *appointment* of a chaplain, as distinguished from paying one. Whether the legislature can avoid advancing or inhibiting religion and excessive entanglement with religion by appointing a single chaplain on a continuing basis for year after year or even for a several-month session is problematical. I leave the matter where the Court of Appeals for the Eighth Circuit left it in *Bogen v. Doty:*

> "We would be less than candid if we did not warn the county of the quagmire it is near. Up to the time of oral argument, all persons delivering invocations were members of the Christian faith. We have no reason to believe that persons of any religious persuasions have volunteered and been turned down by the board. If in the future this should occur the board will be in a very difficult position to defend against an allegation that it is excessively entangled

in religion by giving public approval to some groups while denying it to others. We will not speculate on what, if any, criteria the county might permissibly use in selecting speakers; we only suggest that the process might prove more burdensome in time and money than is justified by the benefits."

598 F. 2d at 1114.

The members of the Executive Committee of the Legislative Council merely recommend the person to be appointed chaplain. They do not, so far as I can tell, direct payment for the chaplain or the printing of the prayer books. The lawsuit, therefore, should be dismissed as to them.

JURISDICTION OF THE COURT

The action was filed under 42 U. S. C. § 1983, and the court has jurisdiction because of 28 U. S. C. § 1343(3).

Dated December 24, 1980.

BY THE COURT
/s/ Warren K. Urbom
Chief Judge

Footnote 1/ Stokes & Pfeffer, *Church and State in the United States* (1st ed. 1964), pp. 83, 478-482.

Footnote 2/ *Colo v. Treasurer and Receiver General,* Mass. 392 N. E. 2d 1195 (1979).

Footnote 3/ Here, the plaintiff is a member of the legislature and no question has been raised of his standing to bring this action, except as discussed in footnote 14, infra.

Footnote 4/ Blau, *Cornerstones of Religious Freedom in America* (1949), pp. 136-156.

Footnote 5/ Nebraska House Journal, Council and House, First and Second Sessions 1855, shows that on Monday, January 22, "on motion of Mr. Richardson, RESOLVED that the President be authorized to invite Rev. W. Hamilton or some other clergyman, to officiate as chaplain to this body at the opening of its daily sessions."

Footnote 6/ Laws, 1867, Sections 2, 3 and 4.

Footnote 7/ Section 50-111, R. R. S. Neb. (1943, as amended).

Footnote 8/

". . . [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive governmental entanglement with religion . . ."

413 U. S. at 773

Footnote 9/ Pfeffer, *Church State and Freedom* (1967), p. 248, citing Fleet, "Madison's Detached Memorandum," William & Mary Quarterly, October, 1946, p. 559.

Footnote 10/ *Ancient & Accepted Scottish Rite of Freemasonry v. Board of County Commissioners*, 122 Neb. 586, 241 N. W. 93 (1932), quoting *People v. Board of Education*, 245 Ill. 334, 339.

Footnote 11/ *Engel v. Vitale*, supra, at 424-425.

Footnote 12/ A rule of the Nebraska Legislature requires that "every member shall be present within the Legislative Chamber during the meetings of the Legislature . . . , unless excused . . ." Unless the excuse for nonattendance is deemed sufficient by the legislature, the "presence of any member may be compelled, if necessary, by sending the Sergeant at Arms." Rule 2, section 4, Rules of the Nebraska Unicamerial January 23, 1979, plaintiff's Exhibit 4. The rule is rarely if ever used. Senator Chambers usually absents himself during the prayers and so far as the evidence shows there has been no attempt to enforce the rule. Whether he has sought to be excused is not known.

Footnote 13/ *Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934).

Footnote 14/ Without otherwise addressing the issues of paying the chaplain and publishing the prayer books, the defendants argue that the plaintiff has no standing to raise those issues, presumably on the theory that he is seeking to raise them only because of his status as a taxpayer and taxpayers, as such, have no standing to challenge the expenditures. But it appears to me that Senator Chambers is challenging the entire prayer practice, including its features of payment, printing and

distribution, as a non-Christian member of the legislature, not merely as a taxpayer. He has standing.

Footnote 15/ The foreword to the published book of prayers for 1979 expresses a religious purpose only and acknowledges a goal of encouraging the use of the prayers by others who may wish to use them "as expressions of faith before God and others." It continues:

> "I have the distinct impression that a new hunger for the transcendent is abroad in our land. The vertical dimension of life is again asserting its claims. Even the more flambouyant secularism cannot fully stifle the human need to pray. We need God's power, presence and purpose in our pilgrimage, and we need the opportunity to express this need. This discovery may yet be the most significant fact as our nation begins the decade of the 1980's."

Footnote 16/ *Tilton v. Richardson*, 403 U. S. 672, 683 (1971).

Footnote 17/ *Meek pittenger*, 421 U. S. 349 (1975); *Wolman v. Walter*, 433 U. S. 229 (1977).

Footnote 18/ *Sloan v. Lemon*, 413 U. S. 825 (1973).

Footnote 19/ On September 23, 1789, Madison presented to the House of Representatives a Conference Report, recommending adoption of a stronger version of the Religion Clauses than the Senate had previous accepted. "As Irving Brant puts it, 'Of all the versions of the religious guarantee, this most directly covered the thing he was aiming at—absolute separation of church and state and total exclusion of government aid to religion.'" The House and Senate immediately adopted the amendments approved in the Conference Report, ratification followed, and the wording remains to this day. Schwartz, *The Bill of Rights: A Documentary History* (1971), Volume II, p. 1159.

EXHIBIT D

No. 81-1077

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

Ernest Chambers,

Appellee,

v.

Frank Marsh, State Treasurer, and Robert E. Palmer, Chaplain and Officer of the Nebraska Unicameral,

Appellants.

Frank Lewis; John DeCamp; Robert L. Clark; Tom Fitzgerald; Steve Fowler; Howard A. Lamb; Richard D. Marvel; Loran Schmit and Jerome Warner, in their official capacity as members of the Executive Board of the Legislative Council of the Nebraska Unicameral.

No. 81-1088

Ernest Chambers,

Appellant,

v.

Frank Marsh, State Treasurer, and Robert E. Palmer, Chaplain and Officer of the Nebraska Unicameral; Frank Lewis; John DeCamp; Robert L. Clark; Tom Fitzgerald; Steve Fowler; Howard A. Lamb; Richard D. Marvel; Loran Schmit and Jerome Warner, in their official capacity as members of the Executive Board of the Legislative Council of the Nebraska Unicameral,

Appellees.

Appeal and Cross-Appeal from the United States District Court for the District of Nebraska.

Submitted: October 13, 1982
Filed: April 14, 1982

Before HEANEY and STEPHENSON, Circuit Judges, and OLIVER,* Senior District Judge.

HEANEY, Circuit Judge.

The Nebraska legislature compensates a chaplain to open each legislative session with a prayer and, from time to time, collects and publishes the prayers in book form. Ernest Chambers, a Nebraska legislator, challenges this practice as violating the Establishment Clause of the First Amendment. The district court[1] enjoined some elements of the practice and upheld others, from which both Chambers and the defendants[2] appeal. We affirm in part and

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*The Honorable JOHN W. OLIVER, United States Senior District Judge for the Western District of Missouri, sitting by designation.

[1]The Honorable Warren K. Urbom, Chief Judge, United States District Court for Nebraska.

[2]The defendants are Frank Marsh, the state treasurer of Nebraska, who dispurses funds for the chaplain and for printing of the prayer books; Reverend Palmer, the legislative chaplain; and the individual legislators who comprise the Executive Board which administers the chaplaincy program. The district court enjoined the treasurer from expending funds to compensate a chaplain or to print prayer books and enjoined the chaplain from accepting compensation. It dismissed the action against the legislators.

reverse in part, and remand the matter for further action consistent with this opinion.

The essential facts are undisputed. Rule 1, sections 2 and 21, of the Rules of the Nebraska Unicameral provide that a chaplain shall be selected by the legislature through its Executive Board and that such chaplain shall attend and "open with prayer" each day of each session. Reverend Robert Palmer, an ordained Presbyterian clergyman, has been selected and has served as the sole legislative chaplain for every session since 1965. Chaplain Palmer is compensated out of general tax revenues at the rate of $320 per month for each month the legislature is in session. In 1975, 1978 and 1979, several hundred copies of prayer books were prepared and distributed pursuant to express legislative authorization, at a total cost to taxpayers of several hundred dollars. The books are comprised of the daily prayers offered in those years and have been distributed to both members and nonmembers of the legislature.

Senator Chambers is a taxpayer and citizen of Nebraska, as well as a duly elected member of the legislature. In 1979, he commenced a section 1983 action challenging the foregoing practice in its entirety—the compensation of the chaplain, the printing of the prayer books and the offering of daily prayers—arguing that the practice violates the Establishment Clause. The district court distinguished these three elements, ruling that compensation of the chaplain and financing of the prayer books are unconstitutional, but that offering daily prayers is not.

A.

Before reaching the merits of this case, we must address the defendants' claims that the action is barred by

the Tenth Amendment and by doctrines of standing, abstention and legislative immunity. We find no merit in any of these contentions.

The defendants argue that Nebraska's prayer practice is immune from federal judicial scrutiny under the Tenth Amendment, relying on *National League of Cities v. Usury*, 426 U.S. 833 (1976). *National Cities*, however, involved limits on congressional power to interfere, under the commerce clause, with certain essential state governmental functions.[3] Here, the issue is whether the First Amendment prohibits the Nebraska prayer practice, not whether Congress has interfered with state sovereignty.[4] Nothing in *National Cities* even hints that the Tenth Amendment immunizes state action from constitutional scrutiny. Indeed, if we adopted the defendants' position, the Tenth Amendment would shield state action from the entire Bill of Rights. We decline to do so.

The defendants next contend that Senator Chambers lacks standing, arguing that Chambers' taxpayer status is insufficient and that, under more general standing principles, he lacks any individualized injury that is different

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[3]It appears that the reasoning of *National Cities* is limited to congressional action under the commerce clause. *See, e. g., State of New Hampshire v. Marshall*, 616 F. 2d 240 (1st Cir. 1980).

[4]Because the present action was brought under section 1983, the defendants attempt to construe it as a federal statutory interference with state functions, as in *National Cities*. This view ignores the fact that section 1983 is essentially jurisdictional in the present context—the controlling substantive issue is whether the First Amendment bars the Nebraska practice. If it does, any resulting "interference" with the state action is mandated by the Constitution.

from the general grievance which any Nebraska citizen might assert. To support these contentions, the defendants attempt to separate the expenditure aspect of the chaplaincy from the prayers themselves, notwithstanding that defendants elsewhere argue the two elements cannot be treated separately. The defendants also attempt to construe the expenditure aspects as incidental administrative items that one lacks standing to challenge unless one is challenging a more general program of expenditures.

We think it is clear that Chambers has standing to assert his claim. The chaplain is selected and compensated for performing ostensibly one function—opening each legislative day with a prayer. Chambers challenges the formal legislative rule and established practice as a whole, not merely incidental elements of it. A taxpayer clearly has standing to challenge the expenditure foundation of such a practice because of the nexus between his taxpayer status and the Establishment Clause claim. *See Flast v. Cohen*, 392 U. S. 83 (1968); *Murray v. Buchanan*, No. 81-1301 (D. C. Cir. Mar. 9, 1982) (taxpayer standing to challenge congressional chaplaincy); *cf. Stone v. Graham*, 449 U. S. 39 (1980) (standing not even disputed). Moreover, Chambers properly asserts particularized injury in that, as a member of the legislature, he squarely confronts the prayer program on a daily basis.[5] We thus have no difficulty finding standing to assert the present claim.

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[5]Senator Chambers asserts a significant personal impact from the practice. As a non-Christian, he vigorously objects to commencing his legislative business with allegedly "official prayers." Legislative rules require attendance at every session, but Chambers has found some of the prayers so offensive to his values that he has excused himself on occasions during the prayers.

The defendants also contend that the abstention doctrine precludes federal courts from entertaining the present action. We cannot agree. Abstention ordinarily involves deferring federal judicial action when ongoing state proceedings might obviate the need for federal relief. *See Younger v. Harris*, 401 U. S. 37 (1971). Under quite narrow circumstances, the Supreme Court has extended the comity basis of nonintervention to certain state-level executive branch functions. *See Rizzo v. Goode*, 423 U. S. 362, 379-380 (1976).[6] Federalism principles, however, do not in any manner bar the present action. There have never been any state proceedings relative to the present action, much less are any proceedings presently outstanding. Nor is the challenged prayer practice an isolated incident unrelated to official state policy. The prayer practice has been followed with the same minister for over sixteen years and the record as a whole suggests that the practice will continue unless it is held violative of the First Amendment. The present action is thus a proper assertion of a federal claim in a federal court and is fully ripe for decision. *See Zablocki v. Redhail*, 434 U. S. 374, 380 n. 5 (1978) ("[t]here is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy").

The defendants finally contend that the prayer practice may not be challenged because it is subject to legisla-

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[6] *Rizzo v. Goode*, 423 U. S. 362 (1976), involved an alleged pattern of police misconduct. The Supreme Court deemed federal judicial intervention improper because it found the misconduct involved isolated incidents and was not the result of official state policy. *Id.* at 367-369. Here, the alleged unconstitutional conduct is an ongoing practice pursuant to official, formal legislative policy.

tive immunity. Immunity for state legislators under section 1983 has been generally equated with the immunity accorded congressmen under the Speech and Debate Clause. *See Supreme Court of Virginia v. Consumers Union,* 446 U.S. 719, 731-733 (1980). The defendants argue that the chaplain's prayers constitute immune speech and that virtually every act relating to the prayers—the rules requiring such prayers and the compensation paid therefor—are legislative acts immune from challenge. As the Supreme Court clarified in *Gravel v. United States,* 408 U.S. 606, 625 (1972):

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. *Insofar as the Clause is construed to reach other matters, they must be an intergral part of the deliberative and communicative processes* by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, *the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations."* [Citation omitted, emphasis added.]

Here, no speech activity by any legislator is at issue. Moreover, the deliberative process of the legislature will not be impaired to any degree by judicial resolution of the claim brought by Chambers. The prayer practice, as the district court found, bears no substantive relation to the process of enacting legislation. Nor is the independ-

ence of any individual legislator threatened by this action.[7] *See United States v. Brewster*, 401 U.S. 501 (1972). Individual prayer by legislators is not at issue. We hold that legislative immunity does not bar an otherwise proper First Amendment challenge to the formal, established practice of the Nebraska legislature by which it compensates a chaplain to open each session with prayer.

B.

The First Amendment, applicable to the states through the Fourteenth Amendment, requires that states "make no law respecting the establishment of religion." *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The defendants argue that the Nebraska prayer practice does not involve "making a law" for purposes of the Establishment Clause. The district court accepted this argument in part, hypothetically separating the prayer from the practice as a whole.

> The legislature by majority vote invites a clergyman to give a prayer; neither the inviting nor the giving nor the hearing of the prayer is making a law. On this basis alone * * * the saying of prayers, per se, in the legislative halls at the opening session is not prohibited by the First and Fourteenth Amendments.

504 F. Supp. at 588.

The present action, however, does not focus on isolated utterances or invitations during legislative sessions

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[7]We note that the district court dismissed this action as to the legislator-defendants and enjoined only the state treasurer and the chaplain. Because we do not extend the injunction to any legislators, we need not address whether such relief would be barred by legislative immunity.

and there is no reason to speculate whether prayer practices other than the one at issue here would constitute "law making" for purposes of the Establishment Clause. Here, the Nebraska legislature has adopted formal rules requiring the selection of a chaplain and the offering of prayer by such chaplain on each day of the legislative session. By express authorization, the chaplain is compensated for this service and, from time to time, the prayers are collected and published in book form. Such state sanctioned, sponsored and financed prayer activities certainly reflect sufficient "law making" to present a justiciable claim under the Establishment Clause. *See, e. g., Bogen v. Doty,* 598 F. 2d 1110 (8th Cir. 1979) (informal rule); *Voswinkel v. City of Charlotte,* 495 F. Supp. 588 (W. D. N. C. 1980) (employment contract).

We thus reach the substantive issue on its merits—does the Nebraska prayer practice violate the standard embodied in the Establishment Clause. The test for this inquiry is clear: the challenged state action must (1) serve a clearly secular purpose, (2) have a primary effect which neither advances nor inhibits religion, and (3) avoid excessive government entanglement with religion. *Comm. for Public Education and Religious Liberty v. Nyquist,* 413 U. S. 756, 773 (1973).

In applying this test, the district court separated the actual prayers and chaplaincy from the compensation of the chaplain and the printing of the prayer books. Analyzing these elements independently, the court concluded that the chaplaincy and prayers are permissible, but that compensation of the chaplain and publication of the books are unconstitutional.

It might be proper to separate funding from the acts which are funded when, for example, the only disputed state involvement relates to funding.[8] Here, however, the legislative prayers are state sanctioned and, indeed, are required by formal rule. The funding is inextricably bound up with the prayers themselves. The principal function of the chaplain is to offer the daily prayers and he is compensated for performing this function. Parsing out these elements leads to what the defendants emphasized is an incongruous result: sanctioning a chaplain to offer prayers is deemed permissible but compensating him for doing so is not.

In our view, to assess whether the prayer practice has an impermissible purpose or effect, or whether it results in excessive entanglement, the established practice must be viewed as a whole. Whether the prayer practice crosses the line which separates church and state is not always easily discerned. As the Supreme Court has noted: "[t]he line of separation * * * is a blurred, indistinct and variable barrier *depending on all the circumstances of a particular relationship.*" *Lemon v. Kurtzman*, 403 U. S. 602, 614 (1971) (emphasis added). We, therefore, must analyze the various elements of Nebraska's practice as parts of a whole, not as independent unrelated actions. In so doing, we recognize that the present case falls within what might be labeled the "ceremonial prayer" category. Ceremonial recitals have a widespread role in many of our institutions: our presidents traditionally have taken their oath of office on a Bible, many federal courts

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[8] *E. g., Gilfillan v. City of Philadelphia*, 637 F. 2d 924 (3d Cir. 1980) (expenditure for construction of a speaker's platform for the Pope).

open their sessions with a declaration that invokes the deity, and the federal congresses, both before and after adoption of the First Amendment, elected legislative chaplains who offered ceremonial prayers. *See* 1 *Journals of the Continental Congress* 26 (1774); 1 *House J.* 16,610 1, *Senate J.* 12,452. Similarly, our coinage states "In God we Trust," which has been held not to violate the First Amendment. *See Aronow v. United States,* 432 F. 2d 242 (9th Cir. 1970). None of this suggests that legislatures or other public bodies are free to promote religion while claiming to stand on ceremonial tradition. As has been noted by the Supreme Court: "While our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction *may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion.*" (Emphasis added.) *Abington School Dist. of Schempp,* 374 U.S. 203, 231 (1963) (Brennan, J., concurring).

In assessing whether Nebraska's practice transcends permissible bounds, we are guided by this Court's decision in *Bogen v. Doty, supra. Bogen* involved a county board's practice of opening each of its public meetings with a prayer offered by a local member of the clergy. This was a voluntary program. Representatives of various denominations were invited to give the prayer, none were compensated and no prayers were recorded or published. This Court upheld that practice, finding that it advanced a clearly secular purpose of "establishing a solemn atmosphere and serious tone for the board meetings." *Id.* at 1113. The only issue was the offering of invocations, standing alone, and the court suggested that

"establishing solemnity is the primary effect of all invocations at gatherings of persons with differing views on religion." *Id.* at 1114. In also finding that the practice did not excessively entangle government and religion, the *Bogen* Court underscored that no public monies were expended and that there was no evidence the county had given preference to one religious denomination over another. *Id.* Denominational preference and use of public funds were thought to carry a serious potential for dividing persons in the political arena along religious lines, resulting in excessive entanglement between the government and religion. The *Bogen* Court, while upholding the practice as a whole, sternly warned the county "of the quagmire it is near." *Id.*

In our view, Nebraska has fallen into that quagmire with its legislative prayer practice. For sixteen years, the Nebraska legislature has selected and paid one minister, representing one denomination, to open each legislative session with prayer. The state has compensated the minister for offering such prayers. It has published his prayers for distribution to members and nonmembers of the legislature.

Such a practice violates all three elements of the constitutional test applicable here. The purpose of the practice as a whole must be to advance and give preference to one religious view over others. There is little other reason for singling out one minister of one denomination for such an extended period of time, and for further promoting that minister's religious expressions by publishing his prayers under state auspices.

The primary effect of the practice as a whole is unmistakeably to advance religion and to give preference

to one religious view. The state has placed its official seal of approval on one religious view for sixteen years and has stood behind that seal with its funds—both to compensate the minister and to publish his prayer books. There is no merit to defendants' claim that such acts are only internal to the legislature and have no effect on the public. The prayer books have been distributed to members and nonmembers of the legislature. Moreover, the legislative sessions clearly are public meetings at which the press and general public are ordinarily present. Those who have observed or participated in Nebraska's legislative process over the last sixteen years would have to conclude that the legislature has an official view on religion which is expressed by its minister and promoted with the use of state funds.

The prayer practice also entangles the state with religion in precisely the manner warned of in *Bogen*. By using state monies to compensate the same minister for sixteen years and to publish his prayer books, the state engenders serious political division along religious lines. The result is the type of excessive entanglement which must be avoided under the First Amendment.

We therefore hold that Nebraska's legislative prayer practice, taken as a whole, is unconstitutional as a violation of the Establishment Clause of the First Amendment. We do not hold that invocations alone are unconstitutional. Indeed, *Bogen* demonstrates that some invocation practices can be constitutionally conducted. Nor do we hold that a legislative chaplaincy, even a paid chaplaincy, is *per se* unconstitutional. We recognize that a paid chaplain might be assigned functions other than offering official prayers, functions that could be deemed proper in

some contexts.[9] As indicated in *Bogen v. Doty, supra*, a chaplaincy program also might rely on volunteer members of the clergy and involve diverse theological representatives. The purpose and effect of such alternatives, however, must be examined in the light of a full record when they present an actual controversy. We cannot speculate on the constitutionality of practices that are not before us.

We decide only the questions presented here. We hold that the Nebraska legislature cannot continue to engage in its established practice by which a single minister is paid to offer legislative prayers and is retained as the exclusive source of such prayers over an extended period of time. The publishing of prayer books is similarly an impermissible part of such practice. The injunction entered below should be modified to reflect that the state is enjoined from engaging in the established practice by which it has operated the chaplaincy.

The only remaining issue involves attorneys' fees. The district court considered the plaintiff to be a partially prevailing party and awarded part of the fees requested by plaintiff's counsel. The court denied certain time and expense items that were deemed unnecessarily duplicative, which we cannot say was an abuse of discretion. The court also indicated, however, that in arriving at an overall fee, it took into account the fact that the plaintiff was only

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[9]The plaintiff concedes that tax-paid chaplains have been upheld, for example, in the context of military bases, where the nature of the government service would restrict free exercise rights if a chaplain was not provided. It is at least conceivable that the same rationale might apply in some cases to legislative service. See *Abington School Dist. v. Schempp*, 374 U. S. 203, 296-299 (1963) (Brennan, J., concurring).

partially successful. Both the plaintiff and defendants construe this as meaning that the fee award was reduced from what it would have been had the plaintiff fully prevailed. Such a reduction appears improper under *Brown v. Bathke,* 588 F. 2d 634, 638 (8th Cir. 1978), but we need not reach the issue of fee awards for partially prevailing parties. The plaintiff challenged the prayer practice as a whole and, under our holding, the state is enjoined from engaging in its present practice. The plaintiff is a fully prevailing party for purposes of a fee award. Thus, it would not be proper to reduce fees on the theory plaintiff prevailed only partially, and a new fee award should be made on remand. A determination of costs and fees on the appeal will be made upon proper motion.

The district court is affirmed in part and reversed in part and the case is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

EXHIBIT E

Nos. 81-1077 and 81-1088

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

September Term, 1981

Ernest Chambers,

Appellee/Cross-Appellant,

vs.

Frank Marsh, etc. et al.,

Appellants/Cross-Appellees.

Appeal from the United States District Court
for the District of Nebraska.

On motion of appellants/cross-appellees, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of sixty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 12, 1982